RESPONSE REQUESTED
GRANTED

ORIGINAL

No. 99-9073

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

PAULA L. BUFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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RECEIVED
SUPREME COURT U.S.

QUESTION PRESENTED

Whether a district court's determination that a defendant's prior convictions are not "related," for purposes of the career offender provision of the Sentencing Guidelines, is subject to a deferential standard of review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 201 F.3d 937.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2000. The petition for a writ of certiorari was filed on April 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). The district court sentenced petitioner as a career offender to 188

months' imprisonment to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. A1-A8.

1. a. On January 23, 1992, petitioner entered Jack's Mobil Service Station in Milwaukee, Wisconsin. She produced a handgun, pointed it at an employee, and demanded money. The employee handed over $450 in cash. Petitioner fled in a Buick Skylark. Police officers traced the Skylark to petitioner, who was stopped while driving the car later that day. See Pet. App. A3; Gov't C.A. Br. 5.

At petitioner's residence, the police officers found 25 packages of cocaine, with a total weight of 73.44 grams, and a .32 caliber semiautomatic pistol. Petitioner admitted that the cocaine was hers and that she sold about 12 ounces of cocaine a week. In response to further police questioning, petitioner admitted to committing not only the Jack's Mobile Service Station robbery, but also three other armed robberies of Milwaukee service stations in 1990 and 1991. See Pet. App. A3; Gov't C.A. Br. 5-6.

b. On January 27, 1992, Wisconsin prosecutors filed two criminal complaints against petitioner in Milwaukee County Circuit Court. The first complaint, in Case No. F-920368, charged petitioner with five armed robberies, including the four to which she had admitted. The second complaint, in Case No. F-920369, charged petitioner with possessing a controlled substance, cocaine, with the intent to deliver it. The armed robbery case was assigned to Judge Wedemeyer in Court Branch 34; the drug case was assigned to Judge Geske in Court Branch 23. The two cases were prosecuted

by different assistant district attorneys. See Pet. App. A3; Gov't C.A. Br. 6-7.

On March 20, 1992, petitioner entered a guilty plea to the drug charge. Judge Geske set a sentencing date of May 21, 1992. See Gov't C.A. Br. 6-7.

On April 20, 1992, petitioner entered a guilty plea to four of the five armed robbery charges. Judge DiMotto, who presided at the guilty plea proceeding, scheduled the sentencing for May 21, 1992, observing that "[t]he sentencing is to be in conjunction with the sentencing in the other case." No order consolidating the drug case with the armed robbery case was ever entered. See Gov't C.A. Br. 7.

At petitioner's sentencing, one assistant district attorney presented the State's position in the armed robbery case, while another assistant district attorney presented the State's position in the drug case. Judge Geske sentenced petitioner to six years' imprisonment for the drug offense, 12 years' imprisonment for two of the armed robberies, and 15 years' imprisonment for the other two armed robberies, all terms to run concurrently. The court entered two judgments, one in the armed robbery case and one in the drug case. See Pet. App. A3-A4; Gov't C.A. Br. 7.

2. a. On March 18, 1998, petitioner entered the State Financial Bank in Milwaukee. She approached a teller window, placed a bag on the counter, and presented the teller with a note that read: "Please be calm and no one will be hurt. There is a bomb in the bag set to go off in five minutes. Put loose bills in

paper bag. Count to fifteen before calling bomb unit. I will kill us all if necessary." The teller turned over $2,615 to petitioner, who then fled the bank. See Gov't C.A. Br. 4.[1]

On November 3, 1998, a federal grand jury indicted petitioner on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). On December 14, 1998, petitioner entered a guilty plea to the charge. See Gov't C.A. Br. 4.

b. The Presentence Report (PSR) prepared by the Probation Office classified petitioner as a career offender under the Sentencing Guidelines. A defendant is a career offender, and thus is subject to an enhanced sentence, if "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Guidelines § 4B1.1. In order to satisfy the third prong of the definition, a defendant must have at least two prior felony convictions, "counted separately." Id. § 4B1.2(c)(2). The Guidelines state that "[p]rior sentences imposed in unrelated cases are to be counted separately," whereas "[p]rior sentences imposed in related cases are to be treated as one sentence." Id. § 4A1.2(a)(2). Application Note 3 to Guidelines § 4A1.2 offers further guidance on

[1] The bag did not, in fact, contain a bomb. See Gov't C.A. Br. 4.

when sentences are to be treated separately:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

The PSR counted petitioner's 1992 drug conviction as separate from her 1992 armed robbery convictions.[2] As a career offender, petitioner was subject to a Guidelines sentencing range of 188 months' to 235 months' imprisonment, as opposed to 84 months' to 105 months' imprisonment. Pet. App. A1.

Petitioner challenged the PSR on the ground that she was not properly classified as a career offender. She argued that her state drug and armed robbery convictions were related under the Guidelines because the cases had been consolidated for sentencing.

The district court rejected petitioner's challenge. Pet. App. B7-B8. The court noted that there was no formal order consolidating the cases or any agreement between the State and petitioner with respect to consolidation. Id. at B1-B2. The court concluded that the drug and armed robbery cases were not "function[ally] consolidat[ed]," as petitioner contended, simply because the same judge sentenced petitioner on the same day in both cases. Id. at B5. The court noted that petitioner entered guilty

[2] Although, as the court of appeals noted (Pet. App. 2A), petitioner "has more than 22 prior convictions," only the 1992 convictions were considered in determining her career criminal status. The four armed robberies of which petitioner was convicted in 1992 were treated as related offenses. Id. at A4.

pleas in the two cases on different days before different judges and that different assistant district attorneys represented the State in the two cases, including the sentencing proceedings. Id. at B1, B2. The court found that the drug offense was not factually related to the armed robbery offenses -- e.g., "[i]t wasn't as if she was charged with possession of drugs and robbery of someone to have obtained the drugs" -- and that the State had distinct interests in the two cases. Id. at B5-B6. Accordingly, the court concluded that the drug and armed robbery convictions were not related within the meaning of Section 4A1.2 of the Sentencing Guidelines, and thus that petitioner qualified for sentencing as a career offender. Id. at B7-B8.

3. The court of appeals affirmed. Pet. App. A1-A8.

The court of appeals held that a district court's ruling on whether a defendant's prior convictions are related, for purposes of the Section 4A1.2 of the Sentencing Guidelines, is subject to deferential, rather than de novo, appellate review. Pet. App. A7-A8. The court observed that, under circuit precedent, "[r]elatedness" and "consolidation" are not mere matters of form; rather, two criminal cases may be treated as having been functionally consolidated, without any formal order of consolidation, "when they are factually or logically related, and sentencing was joint." Id. at A4, A6. In view of that precedent, the court characterized the issue whether two cases are related as "a classic mixed issue where the court must apply legal norms to classify the facts." Id. at A6. The court noted that such mixed

issues of law and fact "are principally committed to district courts, with deferential appellate review." Ibid. The court reasoned that such a standard is appropriate with respect to the particular issue here "[b]ecause of the (obviously) fact-intensive nature of the inquiry and because a sentencing court's findings regarding factual relatedness in any given case are unlikely to establish widely applicable principles of law." Id. at A7 (quoting United States v. Mapp, 170 F.3d 328, 338 n.15 (2d Cir.), cert. denied, 120 S. Ct. 239 (1999)). The court noted that most circuits that have considered the question -- and all that have offered "a reasoned explanation for the choice" -- have held that relatedness issues are subject to deferential review. Id. at A6 (citing cases), A7.

Applying that standard, the court of appeals held that the district court did not commit clear error in concluding that petitioner's drug conviction and armed robbery convictions were not related. Pet. App. A8. The court noted that "[s]eparate sentences were imposed and separate judgments entered" in the two cases. Ibid. The court also observed that "[t]reating [petitioner] as a career offender makes a good deal of sense," given "her lengthy record demonstrat[ing] that she is an incorrigible criminal who regularly uses weapons." Ibid. The court thus found it unnecessary to decide whether the district court's ruling would also have withstood de novo review. See id. at A5 (observing that "if our rule is to make a de novo decision, then this appeal could come out either way").

ARGUMENT

Petitioner contends (Pet. 12-13) that the court of appeals erred in holding that a district court's determination that criminal convictions are related, for purposes of Section 4A1.2 of the Sentencing Guidelines, is subject to deferential review, as opposed to de novo review. Contrary to petitioner's assertions, however, the court of appeals' holding is correct, is consistent with the decisions of this Court and the vast majority of the other circuits that have considered the issue, and does not warrant this Court's review.

1. Congress has provided that, in reviewing sentencing appeals, "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. 3742(e). While pure legal questions under the Guidelines merit de novo review, see Koon v. United States, 518 U.S. 81, 100 (1996), as the court of appeals recognized (Pet. App. A6) and petitioner does not dispute, the question whether a defendant's prior convictions occurred in "related cases," within the meaning of Section 4A1.2(a)(2), is a "classic mixed question" of law and fact. This Court has explained that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate

scrutiny will not contribute to the clarity of legal doctrine." Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)); accord Koon, 518 U.S. at 99 (district courts' departures from the Guidelines are reviewed deferentially); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402-405 (1990) (district courts' determinations that a complaint is "frivolous" under Rule 11 of the Federal Rules of Civil Procedure are reviewed deferentially).

This case concerns such an issue. As the court of appeals explained, a district court's inquiry into whether two criminal cases are related is "obviously fact-intensive" and is "unlikely to establish widely-applicable principles of law." Pet. App. A7 (quoting United States v. Mapp, 170 F.3d 328, 338 n.15 (2d Cir.), cert. denied, 120 S. Ct. 239 (1999)) (internal parentheses omitted). That inquiry, like those in Koon and Cooter & Gell, typically involves "multifarious, fleeting, special, narrow facts that utterly resist generalization." Koon, 518 U.S. at 99. Here, for example, the district court scrutinized the records of petitioner's prosecutions in Milwaukee County Circuit Court in 1992 to ascertain whether the prosecutions had been formally consolidated or had been effectively consolidated by the acts of the presiding judges and the parties. As the court of appeals observed, "[h]ow best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties." Pet. App. A7-A8. In such circumstances, "de novo review is 'unlikely to establish clear guidelines for lower courts,'" Koon,

518 U.S. at 99 (quoting Cooter & Gell, 496 U.S. at 405), and thus is not a productive use of judicial resources.

2. Ten circuits have addressed the standard of review applicable to various aspects of district courts' rulings on whether convictions are related within the meaning of Guidelines Section 4A1.2. Seven of those circuits, including the Seventh Circuit in this case, have expressly adopted a deferential standard. See Mapp, 170 F.3d at 338; United States v. Huggins, 191 F.3d 532, 539 (4th Cir. 1999), cert. denied, No. 99-7896, 2000 WL 575156 (May 15, 2000); United States v. Irons, 196 F.3d 634, 638 (6th Cir. 1999); United States v. Bartolotta, 153 F.3d 875, 879 (8th Cir. 1998), cert. denied, 525 U.S. 1093 (1999); United States v. Wiseman, 172 F.3d 1196, 1219 (10th Cir.), cert. denied, 120 S. Ct. 211 (1999); United States v. Mullens, 65 F.3d 1560, 1565 (11th Cir. 1995), cert. denied, 517 U.S. 1112 (1996).[3]

The court of appeals stated that three other circuits review "'relatedness' issues" under a de novo standard. Pet. App. A6 (citing United States v. Correa, 114 F.3d 314, 317 (1st Cir.), cert. denied, 522 U.S. 927 (1997); United States v. Huskey, 137 F.3d 283, 285 (5th Cir. 1998); United States v. Allen, 153 F.3d 1037, 1045 (9th Cir. 1998), cert. denied, 525 U.S. 1170 (1999)).

In Correa, the court of appeals resolved a general question concerning whether convictions for factually unrelated offenses

[3] Petitioner mistakenly characterizes (Pet. 13) the decision below as adopting as "the minority 'deferential' standard." As the cases cited in the text demonstrate, the deferential standard is the predominant standard in the federal courts of appeals.

could ever be deemed to be related in the absence of a formal order of consolidation. After noting that review of sentencing determinations "ordinarily is deferential" except "to the extent that an alleged error involves the * * * interpretation of a sentencing guideline [which] presents a question of law warranting plenary review," the court held that charges based on offenses that are "temporally and factual distinct * * * should not be regarded as having been consolidated (and, therefore, 'related') unless the original sentencing court entered an actual order of consolidation or there is some other persuasive indicium of formal consolidation apparent on the face of the record." Correa, 114 F.3d at 317. That holding is consistent with the court of appeals' holding in this case. See Pet. App. A8 ("Questions concerning application of the Guidelines are reviewed deferentially * * * unless the district court makes an identifiable legal mistake.").

In Huskey, the court of appeals held that "offenses charged under the same docket number have been 'consolidated' even absent a formal order of consolidation." 137 F.3d at 286. The question in Huskey was thus more purely legal than the question in this case. The Huskey court did indicate that it believed that circuit precedent "impels a de novo review of relatedness determinations," id. at 286 n.3, but it did not specifically address the standard of review applicable to a district court's "obviously fact-intensive" inquiry whether, under the general legal rules articulated in Huskey and earlier cases, a particular defendant's prior convictions are related. Pet. App. A7 (quoting Mapp, 170 F.3d at

338 n.15 (parentheses omitted)).

In Allen, the Ninth Circuit stated generally that "[w]e review de novo whether two prior sentences are related under § 4A1.2," citing as authority its earlier decision in United States v. Chapnick, 963 F.2d 224, 226 (9th Cir. 1992). Allen, 153 F.3d at 1045. Chapnick also made clear, however, that "[a]ny findings of fact that underlie the district court's sentencing decision are reviewed for clear error." Chapnick, 963 F.2d at 226. And Allen itself recognized that, in determining whether cases are related under Guidelines Section 4A1.2, "the inquiry is fact specific." Allen, 153 F.3d at 1045. It is thus unclear whether the district court's fact-specific determination in this case -- that petitioner's drug conviction was not related to her armed robbery convictions -- would have been reviewed with significantly less deference by the Ninth Circuit than it was by the Seventh Circuit.

In sum, whatever differences arguably may exist in the circuits' articulation of the standard of review to be applied to district courts' rulings on whether a defendant's prior convictions are related under Guidelines Section 4A1.2, they are unlikely to produce differences in ultimate outcomes. If experience should prove otherwise, the Sentencing Commission is capable of addressing the situation through revisions of the Guidelines and the Application Notes, without the need for this Court's intervention. For example, the Sentencing Commission might provide that, absent a formal order of consolidation, two cases should not be treated as related for purposes of Section 4A1.2, thereby eliminating the need

to ascertain, as in this case, whether the cases were nonetheless functionally consolidated. See Pet. App. A6 (suggesting that such a rule might warrant a different standard of review). As this Court has observed, "in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(o)).

3. In any event, even under a de novo standard of review, the district court did not err in concluding that petitioner's drug conviction was not related to her armed robbery convictions, within the meaning of Guidelines Section 4A1.2. The cases were never formally consolidated. In addition, each case had a different docket number, a different minute sheet, a different scheduled trial date, and a different guilty plea date. Each case was assigned to a different judge and a different assistant district attorney. Although the same judge conducted sentencing in the two cases on the same date, the assistant district attorneys made separate arguments at the sentencing relating to the drug offense and the armed robbery offenses. The sentencing judge imposed different, albeit concurrent, sentences in each case and entered separate judgments of conviction in each case. See Gov't C.A. Br. 12-14. On that record, the district court correctly ruled that petitioner had "two prior felony convictions of either a crime of

violence or a controlled substance offense." Guidelines § 4B1.1; see also Pet. App. B4 (district court observes that, "based on the record that has been made factually, I don't even think this is a close case, to be quite candid").

Accordingly, even if the Court were to conclude that the Seventh Circuit erred in applying a deferential standard of review in this case, petitioner's sentence as a career offender would be unaffected. At a minimum, the Court should defer addressing the standard of review applicable to relatedness determinations under Guidelines Section 4A1.2 until the Court is presented with a case in which the standard would be more likely to affect the ultimate outcome. Cf. Robert L. Stern et al., Supreme Court Practice 173 (7th ed. 1993) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

JUNE 2000

JOINT

APPENDIX

(4)

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PAULA L. BUFORD,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

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For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 10, 2000
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RELEVANT DOCKET ENTRIES

U.S. District Court
Eastern District of Wisconsin (Milwaukee)

CRIMINAL DOCKET FOR CASE #: 98-CR-210-ALL

10/22/98	1	COMPLAINT against Paula Louise Bufford signed by Mag Judge William E. Callahan. [2:98-m-471] (mkr) [Entry date 10/27/98]
		* * *
10/23/98	4	CJA Form 20 Copy 4 (Appointment of Counsel) as to Paula Louise Bufford; Attorney Robert A. Kagen appointed [2:98-m -471] (mkr) [Entry date 10/27/98]
		* * *
10/29/98	6	LETTER f/Judge Callahan re: deft.'s letter addressing discrepancies in her prior record. [2:98-m -471] (kmf) [Entry date 10/29/98]
11/3/98	7	INDICTMENT by USA Counts filed against Paula Louise Bufford (1) count (s) 1 (bdf) [Entry date 11/09/98]
		* * *
12/9/98	10	PLEA AGREEMENT as to Paula Louise Bufford (bdf) [Entry date 12/09/98]
		* * *
4/2/99	15	HEARING MINUTES: (JPS) Sentencing of Paula Louise Bufford (1) count (s) 1. SENT: 188 mos. imprisonment as to Count 1 of the Indictment. SUPERVISED RELEASE: 5 yrs. Conditions of Supervised Release imposed. See judgment for

additional details. FINE: Waived. RESTITUTION: $2,615.00 to: State Financial Bank. SA: $100.00. case terminated Court Reporter: Diane Meredith (kmf) [Entry date 04/06/99]

4/2/99 16 JUDGMENT and Commitment issued to U.S. Marshal as to Paula Louise Bufford by Judge J. P. Stadtmueller. (cc: all counsel) (kmf) [Entry date 04/06/99]

4/5/99 17 APPEAL Notice to USCA by defendant Paula Louise Bufford regarding [16-1]. (cc: all counsel) (kmf) [Entry date 04/06/99]

* * *

4/19/99 20 MOTION Enlarge the Appeal Record to include 1/27/99 PSR, 2/24/99 Addendum to PSR, and 3/26/99 Second Addendum to PSR by Paula Louise Bufford (tlf) [Entry date 04/19/99]

* * *

4/30/99 21 TRANSCRIPT of Sentencing Hearing held 4/2/99 for defendant Paula Louise Bufford (tlf) [Entry date 05/03/99]

* * *

6/17/99 – MARGINAL ORDER by Judge J P. Stadtmueller denying motion Enlarge the Appeal Record to include 1/27/99 PSR, 2/24/99 Addendum to PSR, and 3/26/99 Second Addendum to PSR [20-1] [Entry date 06/17/99]

* * *

2/4/00 24 MANDATE/CERTIFIED COPY w/slip opinion from USCA USCA Number:

99-1834 affirming the decision of the District Court [17-1] for defendant Paula Louise Bufford (tlf) [Entry date 02/08/00]

* * *

RELEVANT DOCKET ENTRIES

GENERAL DOCKET FOR
Seventh Circuit Court of Appeals No. 99-1834

4/8/99	Criminal case docketed. [99-1834] [1166297-1] Transcript information sheet due 4/19/99. Appellant's brief due 5/18/99 for Paula L. Bufford. Docketing Statement due 4/12/99. (joce)
	• • •
4/21/99	ORDER: Attorney Robert A. Kagen is APPOINTED to represent Appellant Paula L. Bufford pursuant to the Criminal Justice Act. [1171295-1] DW [99-1834] (chri)
	• • •
6/28/99	Filed 15c appellant's brief by Paula L. Bufford. Dist filed. [99-1834] [1192446-1] (hard)
6/28/99	Filed motion by Appellant Paula L. Bufford to seal supplemental appendix. [1192465-1] 10c supplemental appendix tendered. [0-0] [99-1834] (squi)
	• • •
6/29/99	ORDER re: Appellant's motion to seal appendix is DENIED as unnecessary. Because all of the documents contained in the supplemental appendix are public records, the appendix need not be sealed. The clerk is directed to file in the supplemental appendix INSTANTER. [1192465-1] JKL [99-1834] (land)

6/29/99	Filed 10e supplemental appendix by Appellant Paula L. Bufford, per order. [99-1834] [1194328-1] (land)
8/2/99	Filed 15c appellee's brief by USA. Disk filed. [99-1834] [1202952-1] (hans)
	• • •
11/17/99	Case heard and taken under advisement by panel: Circuit Judge Jesse E. Eschbach, Circuit Judge Frank H. Easterbrook, Circuit Judge Ilana D. Rovner. [99-1834] [1234306-1] (broo)
	• • •
1/12/00	Filed opinion of the court by Judge Easterbrook. The judgment of the District Court is AFFIRMED. Circuit Judge Jesse E. Eschbach, Circuit Judge Frank H. Easterbrook, Circuit Judge Ilana D. Rovner, [99-1834] [1166297-1] (patb)
1/12/00	ORDER: Final judgment filed per opinion. With costs: n. [99-1834] [1250817-1] (patb)
2/3/00	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings; 2 vol. transcripts; 1 in camera envelope.) [99-1834] [1166297-1] (stef)
	• • •
4/18/00	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 99-9073. [99-1834] [1281786-1] (joce)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,	Case No. 98-Cr-[T.18, U.S.C. § 2113(a) & (d)]
Plaintiff,	98-Cr210
v.	INDICTMENT
PAULA LOUISE BUFFORD,	(Filed Nov. 3, 1998)
Defendant.	

COUNT ONE

THE GRAND JURY CHARGES THAT:

On March 18, 1998 in the State and Eastern District of Wisconsin,

PAULA LOUISE BUFFORD,

defendant herein, did by intimidation, take from the person or presence of another, to wit, a bank employee, approximately $2,615.00 in United States currency, belonging to and in the care, custody, control, management and possession of the State Financial Bank, 2650 N. Downer Avenue, Milwaukee, Wisconsin, an institution whose deposits were then insured by the Federal Deposit Insurance Corporation, and in committing such offense,

the defendant did assault another person, in violation of Title 18, United States Code, Sections 2113(a) & (d).

A TRUE BILL:

/s/ Timothy J. [Illegible]
FOREPERSON

Dated: November 3, 1998

/s/ Thomas P. Schneider
THOMAS P. SCHNEIDER
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAULA LOUISE BUFFORD,

Defendant.

Case No. 98-Cr-210(JPS)

PLEA AGREEMENT

(Filed Dec. 9, 1998)

The Plaintiff, United States of America, by its attorneys, Thomas P. Schneider, United States Attorney for the Eastern District of Wisconsin, and David Robles, Special Assistant United States Attorney, and the defendant, Paula L. Bufford, individually and by Attorney Robert Kagen, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, enter into the following plea agreement:

1. The defendant, Paula L. Bufford, has been charged in an indictment which alleges a violation of Title 18, United States Code, Sections 2113 (a) and (d).

2. The defendant, Paula L. Bufford, states and affirms that she has read the indictment and this plea agreement; that the charges and the terms and conditions of this plea agreement have been fully explained to her by her attorney; and that she fully understands the

charges contained in the indictment, the nature and elements of the crimes, and the terms and conditions of this plea agreement.

3. The defendant, Paula L. Bufford, voluntarily agrees to plead guilty to the one count indictment charging a violation of the Bank Robbery statute (18 U.S.C. § 2113(a) and (d)). A copy of the indictment is attached hereto and is also fully set forth below.

"On March 18, 1998 in the State and Eastern District of Wisconsin,

PAULA LOUISE BUFFORD,

defendant herein, did by intimidation, take from the person or presence of another, to wit, a bank employee, approximately $2,615.00 in United States currency, belonging to and in the care, custody, control, management and possession of the State Financial Bank, 2650 N. Downer Avenue, Milwaukee, Wisconsin, an institution whose deposits were then insured by the Federal Deposit Insurance Corporation, and in committing such offense, the defendant did assault another person, in violation of Title 18, United States Code, Sections 2113(a) & (d)."

4. The parties understand and agree that the offense to which the defendant will enter a plea of guilty carries the following maximum term of imprisonment and fine: 25 years imprisonment and $250,000.00. The count also carries a mandatory special assessment of $100.00, as well as the 5 years supervised release.

5. The parties understand and agree that in order to sustain the charge of Bank Robbery, the government must

prove each of the following propositions beyond a reasonable doubt:

a. That on March 18, 1998, in the State of Wisconsin and Eastern District of Wisconsin, Paula L. Bufford did:

1. take from the presence of a bank employee at State Financial Bank, 2650 N. Downer Avenue, Milwaukee, Wisconsin;

2. United States currency, totalling approximately $2,615.00;

3. said currency belonging to and in the care, custody, and control of State Financial Bank;

4. the State Financial Bank being an institution where those deposits were then insured by the Federal Deposit Insurance Corporation;

5. and said taking was by intimidation;

6. and in taking said property from the presence of the bank employee, the defendant did assault another person i.e. Paula Bufford did willfully threaten to inflict injury on the person of another by presenting a note representing that she had a bomb which she would set off if she did not receive said monies;

7. further, she did have in her possession a bag which she represented to contain a bomb.

6. The parties acknowledge, understand, stipulate, and agree:

a. that the defendant is, in fact, guilty of the offense described in paragraph 3 above, ~~and that the defendant, Paula L. Bufford, did~~

b. that no threats, promises, representations or other inducements have been made, nor agreements reached, other than those set forth in this agreement to induce the defendant to plead guilty;

c. that any sentence imposed by the court will be pursuant to the Sentencing Reform Act and the Sentencing Guidelines;

d. that the defendant's attorney has advised the defendant of the implications of the sentencing guidelines; a computation of those guidelines are attached and incorporated into this agreement;

e. that notwithstanding this agreement, or any recommendations or estimates of the parties and their attorneys, the sentencing judge will make his own determinations regarding any and all issues relating to the application of the sentencing guidelines;

f. that the sentencing judge is neither a party to nor bound in any way by this agreement, and that the judge may impose any sentence authorized by law up to the maximum penalties set forth in paragraph 4 above;

g. that pursuant to Sentencing Guidelines Manual § 1B 1.3, the sentencing judge will consider relevant conduct in calculating the guideline range, even if the relevant conduct is not the subject of the offense to which defendant is pleading guilty;

h. that the defendant may not move to withdraw his guilty plea solely as a result of the sentence imposed by the court; and

i. that absent any court order to the contrary, this plea agreement will be filed and become part of the public record in this case.

7. The government acknowledges, understands and agrees:

a. at this time, the government acknowledges, understands and agrees per the information currently available, that the defendant would qualify as a career offender pursuant to the Federal Sentencing Guidelines § 4B 1.1. As such, she would have an offense level of 34 and a criminal history category VI;

b. as authorized by Section 3E1.1 of the Sentencing Guidelines Manual, to recommend a three-level decrease for acceptance of responsibility but only if the defendant exhibits conduct consistent with the acceptance of responsibility;

c. to advise the sentencing judge of the nature and full extent of the defendant's cooperation, including all criminal activities in which the defendant participated and about which he has informed the government;

d. To make a recommendation in the "middle range" of the appropriate guidelines; and

e. The defendant agrees to make restitution in the amount of $2,615.00 to State Financial Bank.

8. Both parties reserve the right to:

a. apprise the district court and the probation office of any and all information which might be pertinent to the sentencing process including, but not limited to any and all conduct related to the offense as well as any and all matters which

might constitute aggravating or mitigating sentencing factors; and

b. make any recommendation regarding any and all factors pertinent to the determination of the sentencing guideline range; the fine to be imposed; the length of supervised release and the terms and conditions of the release; and any other matters not specifically addressed by this agreement.

9. In entering this agreement, the defendant, Paula L. Bufford, acknowledges and understands that in so doing she surrenders certain rights which include:

a. If the defendant persisted in a plea of not guilty to the charge against her, she would be entitled to a speedy and public trial by a court or jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.

b. If the trial is a jury trial, the jury would be composed of twelve citizens selected at random. The defendant and her attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of guilty. The court would instruct the jury that the defendant is presumed innocent until such time, if ever, as the government establishes guilt by competent evidence to the satisfaction of the jury beyond a reasonable doubt.

c. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not she

was persuaded of defendant's guilt beyond a reasonable doubt.

d. At such trial, whether by a judge or a jury, the government would be required to present witnesses and other evidence against the defendant. The defendant would be able to confront witnesses upon whose testimony the government is relying to obtain a conviction and she would have the right to cross-examine those witnesses. In turn the defendant could, but is not obligated to, present witnesses and other evidence in her own behalf. The defendant would be entitled to compulsory process to call witnesses.

e. At such trial, defendant would have a privilege against self-incrimination so that she could decline to testify and no inference of guilt could be drawn from her refusal to testify. If defendant desired to do so, she could testify on his own behalf.

10. The defendant, Paula L. Bufford, acknowledges and understands that by pleading guilty she is waiving all the rights set forth in the prior paragraph. The defendant further acknowledges the fact that her attorney has explained these rights to her and the consequences of her waiver of these rights.

11. This agreement supersedes all prior understandings, promises and/or conditions, if any, between this office and Paula L. Bufford. No additional understandings, agreements, promises, and/or conditions have been entered into other than those set forth in this agreement and none will be entered into unless in writing and signed by all parties.

12. In summary, Paula L. Bufford acknowledges, understands and agrees that she will plead guilty to Count One of the indictment as referenced in paragraph 3 above; that all crimes about which she has told the government and in which she has implicated herself, will be brought to the attention of the sentencing court as set forth in paragraph 8(b) above; that the government is recommending a three level acceptance of responsibility decrease but only if the defendant exhibits conduct consistent with the acceptance of responsibility.

Date: December 7, 1998 /s/ Paula L. Buford
Paula L. ~~Bufford~~ Buford
Defendant

Date: December 7, 1998 /s/ Robert Kagen
ROBERT KAGEN
Attorney for Defendant

Date: 12-9-98 /s/ Thomas P. Schneider
THOMAS P. SCHNEIDER
United States Attorney

Date: December 9, 1998 /s/ David Robles
DAVID ROBLES
Special Assistant United States Attorney

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Criminal No. 98-CR-210

PAULA LOUISE BUFORD,

Defendant.

TRANSCRIPT OF SENTENCING HEARING

Record made in the above-entitled matter before the Honorable J. P. Stadtmueller, Judge of said Court, on April 2, 1999, commencing at 8:35 a.m.

APPEARANCES

DAVID ROBLES and CHRISTIAN R. LARSEN, Assistant United States Attorneys, 530 U.S. Courthouse, 517 East Wisconsin Avenue, Milwaukee, WI 53202, on behalf of the United States of America.

ROBERT A. KAGEN, Attorney at Law, 740 North Plankinton Avenue, #334, Milwaukee, WI 53203, on behalf of the Defendant (present in court).

Proceedings recorded by machine shorthand, transcript prepared by computer-aided transcription.

Diane Meredith, RPR-CM
Official Court Reporter
517 E. Wisconsin Avenue, Rm. 400
Milwaukee, WI 53202
(414) 297-3779

[2] PROCEEDINGS

THE CLERK: The court calls Case No. 98-CR-210, United States versus Paula Buford for a sentencing hearing. May I have the appearances, please, beginning with the United States?

MR. ROBLES: Thank you. Appearing on behalf of the government, Special Assistant United States Attorney David Robles; also, Assistant United States Attorney Christopher Larsen.

MR. LARSEN: Good morning, your Honor.

MS. MORGAN: Good morning, your Honor. Jennifer Morgan from probation.

MR. KAGEN: Good morning, Judge. Paul Buford appears in person and by Robert Kagen.

THE COURT: Good morning, Mr. Robles. And good morning to you, Mr. Larsen, Ms. Morgan, Mr. Kagen. And good morning to you, Paula Buford.

Paula Buford, on December 14th of last year you entered a plea of guilty and were adjudged guilty as to a single-count indictment charging you with armed bank robbery in violation of Title 18 of the U.S. Code, Sections 2113 (a) and (d). We have now reached that stage of these proceedings where it is the duty of the court to address several questions to both you and Mr. Kagen.

First of all, Ms. Buford, have you had sufficient opportunity to review Ms. Morgan's presentence report prepared [3] in your case under date of January the 27th, as well as the two addenda to that report, first of which

was prepared under date of February 23rd and the second of which was prepared under date of March the 26th?

THE DEFENDANT: Yes, sir, I have.

THE COURT: Thank you.

Mr. Kagen, have you had sufficient opportunity to review those three documents?

MR. KAGEN: Yes.

THE COURT: Are there any facts that have been presented to the court in either the presentence or the two addenda that either you or your client disagree with or take exception to?

MR. KAGEN: That was the purpose of our letter objections, but other than those, no.

THE COURT: Well, I appreciate you had posed objections, but many times during the give and take of hearing the government's response and the probation department's analysis, those objections resolve themselves. So to the extent that you and your client have any objection, first, as to facts presented in the presentence report or the two addenda, now's your opportunity to again have the court address them in the context of the formal sentencing hearing.

MR. KAGEN: The main objection as set forth in our objections relate to the related case issue, and we have a [4] number of fact and legal objections that we set forth. The main issue is the sub-point three, consolidated for sentencing, issue. There were two other ways in which the cases could be related, the single occasion test

and the common scheme or plan test. My main focus was on the third of those, the consolidated for sentencing case or issue. I believe the case law set forth in my first objection shows the functional consolidation is the more logical way of dealing with this and that the angst of the Seventh Circuit is cured by the authority to upwardly depart.

There were some factual objections set forth in my motions, one of which I could think of offhand was that if the presentence in paragraph three was saying we had agreed that she was a career offender, that was not the case. I tried to see how the probation office came to that conclusion, and that, again, is set forth in the letter objection we filed. But, again, I think the main issue, I'm not abandoning the other two but I think the main focus here is consolidating for sentencing issue, and the functional consolidation theory is the more logical one to follow.

THE COURT: All right. Well, first, the minor matter of you and your client agreeing that Ms. Buford qualified as career criminal offender, the probation department has addressed that matter as a correction, and it is for that reason that there's no need for the court to further deal with [5] that this morning.

On the matter of the related case issue that underlies the two criminal convictions, that is, felony convictions addressed in Milwaukee County Circuit Court Cases F-920368 and F-920369, are there any additional facts that have not already been brought before the court either by you or by the government or the probation department that need to be made of record?

MR. KAGEN: No.

THE COURT: All right. With respect to the matter of the underlying facts, Mr. Robles and Mr. Larsen, are there any additional facts that you believe have not been brought to the court's attention with regard to the matter of the two circuit court cases and the consolidation issue that we have just heard from Mr. Kagen on?

MR. ROBLES: There is only one fact which goes to the issue of whether or not the armed robbery which occurred on January 23rd, 1992, was part of a common scheme or plan along with her drug dealing charge on that same date and her arrest. When she was arrested back in 1992, she was interviewed and at that point in time she indicated she began to sell – she began – she used to sell weed but in September of '91 she started to sell cocaine, and the reason that's significant is, by that point in time, there were already two armed robberies, one occurring on March 13th of 1990 and, I believe, the second occurring in May on that same date, the 13th of 1990.

[6] THE COURT: All right. Mr. Kagen, do you take issue with Mr. Robles' comment?

MR. ROBLES: I do have a copy of the show-up.

MR. KAGEN: To speed things up, I was not her counsel back then. I just asked her because I wouldn't have any way of knowing if the factual statement Mr. Robles made was correct. My client does acknowledge that it was correct.

THE COURT: All right. In the vernacular, to cut to the chase here, I think the only factual issue that drives whether or not these cases were consolidated or not is the

extent to which a record was made or perhaps, better stated, was not made before the Milwaukee County Circuit Court on the day of sentencing. It is quite obvious that the guilty pleas that were entered in these two cases numbered 368 and 369 were done on separate days before separate judges, and we only get to the matter of consolidation in terms of Judge Geske imposing sentence on May 21st of 1992. And relating those salient facts, it is clear that there was no agreement between the state and Ms. Buford and her counsel with regard to the consolidation of these cases, either for purposes of charging or for purposes of disposition. And, clearly, there was no agreement, beyond counsel now arguing by inference that there was a consolidation, that, in fact, consolidation was an integral part of the sentencing proceeding on May 21st of 1992. And so to the extent that either the government or you, Mr. [7] Kagen, have any additional argument you want to make, the court is simply left to draw from the record that was made before the Milwaukee County Circuit Court in May of 1992 as to whether or not these two cases were in fact consolidated, as that term is used in the context of the federal sentencing guidelines. One of the things that federal judges are not about to get involved in is revisionist history with respect to what may or may not have occurred before another court on another day in another jurisdiction. And so I am simply left to apply as best I can the provisions of the sentencing guidelines together with the applicable application notes to the relevant facts here, but to the extent that there is an inference of consolidation, I am left to conclude that the only inference of consolidation is the fact that sentences were imposed in two different cases on the same date before

the same judge, with no formal consolidation order. And when I say formal, I'm referring to something of record, either before a court reporter or a written document.

And, of course, the other fact that tends to undermine your current suggestion that these cases were in fact consolidated was the fact that two different assistant district attorneys appeared at the sentencing hearing with respect to each of their respective cases. And while that in the final analysis certainly is not controlling, it certainly goes a long way to suggest that, for many reasons that are left to the executive [8] branch of government, including state government, the matter of whether or not cases ought to be consolidated or charges read in or diverted is left to the discretion of the prosecutor. But I'm certainly willing to give you an opportunity to argue as you have in written form, Mr. Kagen, that your client does not meet the federal test for considering these offenses and sentences separately in light of the federal sentencing guidelines that she now is confronted with.

MR. KAGEN: I assume you don't want me to repeat what I've had filed here. I tried to get all the records I could, the transcripts from the state proceedings. And, again, I stand by what I filed. I think the Seventh Circuit's cases fall apart on scrutiny, simple scrutiny, and I think that the Ninth Circuit cases are quite clear that there is a trend towards considering functional consolidation. And as I said earlier, even today, there was tremendous angst in the Seventh Circuit about the effect of this, but there were some recent amendments that I've set forth in the written documents showing that there appears to be a compelling change in the application notes and that the safety valve is to upwardly depart. So,

again, I don't want to rehash everything I've filed. Obviously the court's studied it carefully.

THE COURT: Well, I guess by way of response, Mr. Kagen, I don't know which particular cases you have in mind that lead you to conclude that the Seventh Circuit somehow is [9] changing its attitude or policy in these situations to allow your client to have these two sentences considered consolidated. I may be missing something here, but based on the record that has been made factually, I don't even think this is a close case, to be quite candid. Now, if you've got something to suggest or if I have misread some of your submittal, I'll be happy to take the time to walk through it again this morning, but I'm reading in considerable detail, particularly the March 26th, the second addenda, in which you come back and challenge the probation department.

I'm interested in knowing what further rejoinder you have to the probation officer's response addressed on page four and five of the addenda, because I think Ms. Morgan has laid it out pretty cold, not to be trite, that these cases were not consolidated and ought not be considered by this court as consolidated for purposes of applying the otherwise applicable sentencing guidelines that drive the career offender status that is at bottom in this sentencing proceeding.

MR. KAGEN: My March 19th response did address the *Stalbaum* case, and I thought the government had taken that out of context. I think also, looking at what was cited by way of Wisconsin cases in *Stalbaum*, we see that they go back to 1800 statutes that really have no application here. And, again, I've set that forth in my

submissions. I just don't think that the Seventh Circuit cases are well grounded in current law. I [10] think, as a practical sense, what's happening is the functional consolidation issue that the Ninth Circuit is following and –

THE COURT: Well, regrettably the Ninth Circuit is not the Seventh Circuit, and when you go to the Ninth Circuit, regrettably, there is very little in the way of legal propositions that along the way you can't find some authority for and, as a consequence, in the view of this humble judge, there's not an awful lot of solace in particular cases from the Ninth Circuit because they're literally all over the map. And, more importantly, when the Seventh Circuit has spoken on the issue, there's no reason to go to another circuit with respect to the court's analysis.

And it may well be that this unique set of facts – although I don't think they're very unique in the final analysis – may cause my colleagues on the Seventh Circuit to take another view of all of this. And while I may be tipping my hand a bit here, I am unpersuaded on the state of the record that has been made, looking at all of the facts that are recited chapter and verse, both in the original presentence and then addressed twice over in these two addenda, that leads this court to conclude that, insofar as the operation of the federal sentencing guidelines, that these two state court cases were consolidated. Drugs and bank robberies may on occasion have common ground but in this instance they clearly did not.

And, again, this court is without any record to suggest [11] that the two prosecutors, Mr. Simpson and Mr. Stoiber, in the district attorney's office didn't have separate interests here. There were separate victims in the

bank robberies. The drugs were, other than the temporal relationship, unrelated. It wasn't as if she was charged with possession of drugs and robbery of someone to have obtained the drugs that she was charged with possessing. And it's a matter of having made or not having made an appropriate record. And all we, as federal judges, can do is put full faith and credit in the judgments and convictions that underlie and drive the defendant's criminal history score and apply the guidelines as best we can. But from the record that was made here, I am unwilling and unable, applying the relevant guidelines and the relevant case authority, to agree with Ms. Buford's position that these cases were consolidated and, therefore, the career offender provisions not be triggered and then somehow come back and depart from the guidelines in another fashion. I don't find on the record that that is at all appropriate.

And, fortunately, in this case, unlike several others that this court has recently had experience with, at least the government had the presence of mind to draw to Ms. Buford's attention before she pled guilty to this bank robbery that it was their view that she did qualify for career criminal offender status. So we are not dealing with a situation, as I have recently had to deal with others in your office, Mr. [12] Robles, where it appeared to the court that not only was the defendant and his attorney not aware of the implications of the career offender provisions but the assistant U.S. attorney, regrettably, never said anything. And I think it may have been because she was, although aware of career criminal offender, was not aware of the profound implications

under the sentencing guidelines. So at least we don't have that debacle to confront with in Ms. Buford's case.

So to the extent that the facts are presented here, I am constrained to conclude that the two cases that I referenced earlier, that is, F-920368 and F-920369, were not consolidated as related cases for U.S. Sentencing Guideline purposes.

Are there any other factual matters, Mr. Kagen, that you or your client wish to have the court address?

MR. KAGEN: Nothing other than what was in the submissions, no, Judge.

THE COURT: Thank you.

Mr. Robles, Mr. Larsen, do either of you have any objection as to any of the facts presented by Ms. Morgan in her presentence and the addenda?

MR. ROBLES: No, I do not.

THE COURT: That being the case, the court first adopts all of the facts that have been presented in the presentence report, concluding, as I have already put on the record, that the facts presented do not disclose a [13] consolidation of the two – of the underlying circuit court cases that would preclude the court applying the career offender provisions of the sentencing guidelines to Ms. Buford's criminal history score, triggering an enhancement in her offense level. And I will rely on those facts first in determining the ultimate sentencing guidelines that apply here, together with the ultimate sentence of the court.

Now, in recognition of the court's findings as to the facts, the probation department recommends the following guidelines as being applicable in this case. They include a total offense level of 31, a criminal history score of Roman numeral VI, a guideline term of imprisonment of 188 to 235 months, followed by at least three but not more than five years of supervised release, a fine of not less than $15,000 nor no more than $150,000, and, finally, a $100 special assessment.

Having made those findings and knowing how the court addressed the matter of the consolidation issue on the two state court cases, Mr. Kagen, do you and your client otherwise accept the guidelines as the probation department has recommended them?

MR. KAGEN: Yes.

THE COURT: Thank you.

Mr. Robles, do you and Mr. Larsen similarly accept the sentencing guidelines as recommended by the probation department?

[14] MR. ROBLES: Yes, we do, subject to our recommendation which is made in the plea agreement that I'll expound on.

THE COURT: All right. Thank you. That being the case and the court having no independent basis to take exception to or otherwise disagree with the guidelines as recommended, given my ruling on the underlying facts with regard to the relatedness issue of these two circuit court cases, I do herewith adopt each of the sentencing guidelines as recommended. Again, they include a total offense level of 31, a criminal history score of

Roman numeral V – or VI, a guideline term of imprisonment of 188 to 235 months, followed by at least three but not more than five years of supervised release, a fine of not less than $15,000, nor no more than $150,000, finally, a $100 special assessment.

Having made those findings, Mr. Kagen, do you know of any reason why the court ought not proceed this morning with the imposition of sentence in your client's case; and, if not, is there any statement that you or Ms. Buford would like to make in mitigation?

MR. KAGEN: We have no objection to the proceedings continuing and being completed today.

THE COURT: All right. And knowing that, is there any statement that you would like to make to the court and does your client wish to address the court?

MR. KAGEN: Yes.

[15] THE COURT: All right. You may proceed in any manner you deem appropriate.

MR. KAGEN: I'll comment first. The court obviously has very extensive submissions regarding my client's background. The court is aware she's no stranger to jails and prisons. This court had numerous contacts with her throughout the course of this case. I think that this case has had far more severe impact than the other cases despite the fact they were extremely numerous. I don't know if it's because this is now a federal case and the rules are different, but it's quite clear that it's had a severe effect on her.

Ms. Buford is age 43. Her mother's already passed away. Her grandmother is 84. With the court's ruling

today, it's quite clear that Ms. Buford will die – strike that, the grandmother will die before Ms. Buford gets out of prison. She understands that perhaps she may pass away in prison. She has a 15-year-old son who was at the prior scheduled proceeding. For some reason, he was not produced by Wisconsin social workers today, although I tried to arrange that. And, again, that has a significant impact on her. She sits here alone before this court facing sentencing today.

In talking to her, she tells me that the Ozaukee County Jail has broken her down. She never had suicidal thoughts before but has them now. Her family was unable to continue seeing her since November of last year. She can't mentally [16] stand to do the time away from home at some prison far from her friends and relatives, as may very well be the case here. She's lost her car, her furniture, all her possessions. She hasn't lost her son but can't see him. She won't be able to see the son or family if shipped out of state. And, obviously, the son will be of quite mature years by the time she ever gets out.

She does clearly understand she's not the victim in this case. She does realize that her act was quite serious. She had taken the money to pay bills and not buy drugs and, therefore, at the time was clearly sober and was clearly aware of the terror in the young gentleman teller's eyes as she placed the purported bomb on his teller desk and took the money. She realized how terrible her act was and she told a friend soon after the offense because she was so upset about this and may very well have been turned in by this friend because she felt the need to confide in someone else.

She has reviewed the discovery. She understands how terrorized that young male teller was, how terrorized the staff of the bank was and the terror to those in the vicinity of the bank who happened to be shopping or living in that area and seeing the bomb squad coming to the bank to find that she had only left a brick. And she understands that, again, she's not the victim for this and, having had a clear head at the time, understands the, enormity of what she's done.

[17] I found Ms. Buford to be very smart, extremely energetic. She has ability to give back to society instead of continually taking from society. She now understands she has to work in prison to be able to cope and survive a long period of institutionalization and to increase her educational skills so she won't have any need or thought of returning to crime upon release.

And, again, I think this case already, in the enormity of the sentence and the guidelines, has had a full chilling effect that was intended by Congress. Again, she's informed me that the Ozaukee County Jail has broken her down, caused her to evaluate herself, something she hadn't done before. She had completed the eleventh grade, obtained her G.E.D. and had completed course work in industrial and building maintenance at Lincoln College. While out, she also co-founded a Back-on-Track program in Union Grove, Illinois to work with young girls to keep them from turning to crime. She would like to further such efforts while in prison and/or after. She plans on using her time productively. She intends to pursue her education in prison or social work or the paralegal area. And, again, my numerous contacts with her show I'm convinced that she certainly has the skill

and the energy to successfully complete those educational endeavors.

She wants the court to order drug treatment. She tells me she never had it before. She understands she needs and wants [18] structure so she can learn what she has to do to avoid temptation the next time she feels down or would otherwise feel temptation to turn to drugs or crime.

I ask that she be given credit for having been very candid with the government in admitting she was guilty. She gave a prompt confession to the government upon her apprehension. She entered a very prompt plea in this case, and the original presentence, paragraph nine, described her as being, quote, completely cooperative, close quote. The presentence shows she was extremely candid to the presentence writer and also to prior state court presentence writers.

Again, the money she took from this case was used to pay rent, car payments and bills, not to live high on the hog. She is obviously unable to pay a fine if she's indigent. And, as you've already heard, the government agreed to recommend a middle range sentence, and that was set forth in the plea agreement. I think that even the low range would be far more than is necessary based on the facts summarized here, and I would ask for that. I believe Ms. Buford has a statement she wants to make.

THE COURT: All right. Thank you, Mr. Kagen.

Ms. Buford, is there any additional comments you would like to make, noting, of course, the court has received your letter which you wrote in advance of

today's hearing and I've considered that. So I appreciate your taking the time in the [19] solitude of confinement to put together the thoughts that you did. And, of course, having read the handwritten letter, which I assume and have no reason to question that you were the author of, why it is as an articulate person, as you seem to present yourself in that letter, that you ever found yourself going in for a couple of thousand dollars to jeopardize your entire role not only with your family but with society generally. So to the extent that you have any additional comments, now's your opportunity to present them.

THE DEFENDANT: Your Honor, thank you. I just want to say, above all things, that I'm very sorry for everything, for what I've put the employees of the bank through, the people in the neighborhood and everyone's family by robbing the bank and leaving the bag there, saying that there was a bomb inside. I can't even begin to imagine the fear or trauma that they all went through because of me. And I didn't think about the negative impact my foolish act would have on the employees, the, neighborhood residents or everyone's family.

My actions have tore me beyond description and have weighed very heavy on my mind every day. I can now still remember the expression on Mr. Peterson's face, and it makes me feel very, very sad to know that I instilled something like that in someone. I know I am not that type of person. I can't say I am sorry enough. I wish there was something I could do besides offer a mere apology. Maybe some day in some way I can. I [20] never set out to harm anyone physically, but it never occurred to me what I would do would affect everyone mentally. I'm very sorry.

This case, as Mr. Kagen has said, has actually had a big effect on me, sir. It was out of desperation and fear that I committed this crime. I had turned to different agencies and asked for help and to different people and asked for help and was turned down. So this is a decision that I made that I will regret for the rest of my life.

I do, as he mentioned, intend on furthering myself educationally. If God has it in his will that I may come out soon or sooner than expected, that I won't ever have to turn back to do anything like this again. I don't ever want to come back to jail again, never want to hurt no one else in any kind of possible way. I just ask the court to have mercy on me. I have written a letter to the employees of the bank, which I don't know if it's okay with the courts if I mail it, and if it is –

THE COURT: Well, what I would suggest that you do in that regard, you have Mr. Kagen deliver it to Ms. Morgan, and she in turn will ensure that it gets to the appropriate bank officials. You may continue.

THE DEFENDANT: Your Honor, as I've mentioned, I made a very bad decision. Prior to that date, I was drug-struck on everything. I was in a very clouded day. That day or prior to [21] that day I wasn't. This was a decision made, like I said, out of panic and desperation and fear, and I'm not sure if anyone here has ever had to live with desperation or be faced with it, but it is not a good feeling. But I am not taking it as I am feeling a victim. That's my fault. I just ask the court for mercy. No matter what the circumstances may be I know I won't ever commit another crime. I know I won't ever come back to jail. I do know that. I'm sorry, sir.

THE COURT: Thank you.

Mr. Robles, do you have any comments you would like to make?

MR. ROBLES: I just have a few comments. One, Ms. Buford has been candid and forthright, as she indicated. And as she has said through counsel as well, she immediately took responsibility for this offense, was forthright in her involvement and did enter a guilty plea early on. And the court, I'm sure, will take that into consideration.

The government is making a recommendation in the middle range of the appropriate guidelines, and we are also requesting that the court in its order ensure that restitution in the amount of $2,615 to State Financial Bank is part of that.

I think Ms. Buford, at this point in time, understands the danger of the situation that she put the bank employees in back on March 18th. The trouble is her history and her character demonstrates, one, from 19 – 1973 to 1990, it's almost [22] continuous, and that's unfortunate. Whether that's a product of disruptive family life she had at that point in time, that is something that is documented in the presentence report, and I'm sure that resulted in her involvement in the armed robberies which occurred beginning in 1990. In all those armed robberies, as the court is aware, a firearm was used to obtain property. At that juncture, she was willing to place the lives and safety of others in jeopardy.

Unfortunately, controlled substances seem to have been a part of her life as well since her arrest in '92. At

that point in time, when she spoke to the detectives, she said she had been dealing in marijuana. She also began dealing in cocaine in September of 1991. When she was in arrested in '92, there were 73.44 grams of cocaine as well as a loaded caliber pistol when she was recovered. After she was released on parole – presentence also addresses this – it was only a matter of days before she tested positive for marijuana use. She had positive tests on September 30, 1996, October 21st, September 22nd, October – I'm sorry, October 21st, 1996, September 22nd, 1998, October 23rd, 1998, and apparently her use of controlled substances did play a role in her losing employment. It was the reason she was terminated from the employment at Johnson Brass & Machinery Foundry, as she refused to take a drug test. And the report said she did test positive for drug usage a few days later.

[23] She has the capability to seek and obtain employment. Unfortunately, her history after her release on parole demonstrates that she was not able to follow through on that. There were four periods of unemployment that were employment that were either terminated as a result of her decision to terminate that employment or her employer's decision to terminate her as an employee, and that is unfortunate because that, I think, is important in her making it in the community, being a positive person, being a positive role model to her son, as well as demonstrating that, in fact, she has made some changes and has made some positive decisions about what she wants to do.

The appropriate guideline range the court has already addressed is level 31. That reflects her acceptance of responsibility. I believe that, as a result the fact that no

actual weapon was used in the armed robbery, as well as her acceptance of responsibility, the sentence imposed by the court should be in the middle range of the appropriate guidelines. Thank you.

THE COURT: Thank you, Mr. Robles.

Mr. Kagen, is there anything additional you want to add?

MR. KAGEN: I just find it incredible that she has the intelligence despite the horrible past and the upbringing she has. She's overcome all that to still have this intelligence that shines through. You know, you can't argue the pages and [24] pages of prior offense conduct, but apparently the federal indictment here has had the effect that the others didn't have, and obviously she is going to prison – going to prison for a long time. It's my opinion that the bottom of the range will accomplish the purpose here.

THE COURT: All right. Thank you. Well, in a nutshell, Ms. Buford, the underlying criminal record that you have over a period of 20-plus years put together for yourself is precisely what those that we send to the halls of Congress had in mind when Congress first adopted the sentencing guidelines in 1987 and, as part of that regimen, included career criminal offender status.

It may be an oversimplification but there is, without question, some corollary here, and that is throughout your young adult life, while you had numerous contacts with law enforcement, unfortunately law enforcement did not get your attention, nor did the criminal justice system get your attention in terms of getting on the

straight and narrow. One sentence after another, including the sentence you received for the armed robbery conviction in the state court, they're pathetic. And that's why it is so many states are now realizing that if they're going to make any significant inroads with regard to criminal conduct, they too have got to adopt determinate sentencing.

And it's expensive. For every year that I send you to [25] prison, it's costing the rest of us, as taxpayers, more than $20,000 a year. And you could get a pretty good college education for just one year of what it costs us to keep you in prison. And as you're aware, because of your career criminal offender status, the penalties have been ratcheted up very dramatically. In fact, the sentence that I'm obliged to impose, even at the low end of the guidelines, is more than double what you would have otherwise been eligible for, again, on the low end of the guidelines, had the career offender provisions not applied.

And what I'm going to do in your case, although Mr. Robles won't be terribly pleased, is sentence you at the low end of the guidelines for that reason, because we have already a doubling effect. And a sentence of 188 months, even if you earn all of your statutory good time, is going to result in your having to serve almost 160 months in prison, which is no small amount of time for a $2700 robbery.

As a consequence of the significant enhancement that the career criminal offender provisions provide in this case, against the backdrop of the totality of facts and

circumstances, including your acceptance of responsibility and not putting the government through a trial, I don't believe it's, frankly, in anyone's interest to pile on an additional two to three to four years in terms of the sentence. And so it's going to be my sentence in your case that you be sentenced [26] to a term of 188 months. I'm also not going to impose any fine in your case because you simply do not have the wherewithal to, even in a long prison sentence, accumulate a sufficient amount of money to pay a fine, particularly knowing that you're going to have to pay $2615 in restitution.

So this is the formal sentence of the court – which will also include a recommendation that the Bureau of Prisons evaluate you for treatment in a drug program, although I have to tell you that it is an extremely rare day, regrettably, that anyone who comes before the federal court does not have some sort of problem with drugs today and, as a consequence, while we would like everyone to benefit from drug treatment, the reality here is there are precious few inmates in any federal institution who do not deserve some form of drug treatment and the extent to which that treatment will be available to you is, in large measure, going to be driven by the Bureau of Prison's evaluation and classification system. And if, in the final analysis, you're not getting the treatment that you think you should get, keep in mind that there may be others that are in far worse straits than Paula Buford in terms of the need for that treatment. And it may be that you may not get it right away. It may take a little bit of time in terms of when it is more appropriate for you to get the treatment. It may be better later than earlier, what have you. So I say that at the outset lest you, be further

frustrated, knowing that the judge [27] agreed with you but somehow the Bureau of Prisons is not forthcoming in making it available in the manner and to the degree that you might otherwise expect.

This is the formal sentence of the court: Paula Louise Buford, on December 14th of last year you entered a plea of guilty and were adjudged guilty as to the single-count indictment charging you with armed bank robbery in violation of Title 18 of the U.S. Code, Sections 2113 (a) and (d). The court having asked you why judgment should not now be pronounced and pursuant to the Sentencing Reform Act of 1984, it is my judgment that you, Paula Louise Buford, be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 188 months as to the offense of conviction in Count 1.

I further determine that based upon your limited financial resources, together with a large amount of restitution owed in this case, that you do not have the financial ability to pay a fine and, accordingly, the court waives any fine in your case. Pursuant to the Mandatory Victim's Restitution Act of 1996, you're ordered to pay restitution in the amount of $2,615. That restitution is due and payable to State Financial Bank to the attention of Ron Knaus, K-n-a-u-s, Assistant Vice President, 2650 North Downer Avenue, Milwaukee, Wisconsin, 53211. The court waives any interest on the restitution. The court considers your participation in the Federal Bureau of Prisons Inmate Financial Responsibility Program to be a [28] necessary component toward the repayment of this restitution obligation. Payments under that program shall apply first toward the special assessment that I will later

impose and then to the restitution until both are paid in full.

Upon release from imprisonment, you shall be placed on supervised release for a term of five years. While on supervised release, you shall not commit any federal, state or local crimes and shall comply with the standard conditions that have been adopted by the court and shall comply with the following additional conditions:

First, within 72 hours of release from the custody of the Bureau of Prisons, you shall report in person to the probation office in the district to which you have been released. Second, you are not to possess any firearm or other dangerous weapon. Third, pursuant to the Violent Crime Control and Law Enforcement Act of 1994, you shall not illegally possess any controlled substance for such possession will result in revocation of the supervised release term and you will be obliged to serve a further term in prison.

Fourth, you are to participate in a program of testing and residential or outpatient treatment for drug and/or alcohol abuse as directed by your supervising probation officer until such time as you are released from such program. You are to refrain from the use of all alcoholic beverages throughout the period of your supervised release term.

[29] Following release from imprisonment, you are to reside for the first 90 days in a community correctional center upon the first available vacancy. You are to obey all of the rules of that facility. Sixth, you are to participate in a mental health treatment program and take any and all prescribed medications as directed by the treatment

provider and participate in any psychological or psychiatric evaluations or counseling as directed by your supervising probation officer.

Seventh, you are to pay the balance of any restitution that may be due and owing at a rate of not less than $50 per month. Eighth, you are to provide access to all financial information required by your supervising probation officer. In accordance with the Mandatory Victims Restitution Act of 1996, as provided for in 18 U.S.C. Section 3013, you are ordered to pay a special assessment in the amount of $100. That special assessment is due and payable immediately at the Office of the Clerk of the Court, located in Room 362 of this building.

Having entered a plea of guilty to the underlying offense, I now advise you that if you believe that the guilty plea that you earlier entered was involuntary or otherwise contrary to law or that the sentence that the court imposed in your case this morning was in violation of either the sentencing guidelines or contrary to law, or that the court misapplied any of the sentencing guidelines to the facts of your case, I now advise you of your right to appeal. If you elect to appeal, a [30] notice of appeal must be filed within ten days of today's date or you will have waived your right to appeal.

Finally, if you so request; you have the right to appeal in forma pauperis and also to have the clerk of the court file a notice of appeal on your behalf.

Mr. Kagen, if you or your client has any recommendation for the court to include in the judgment and commitment order beyond my recommendation that she be

evaluated for appropriate drug treatment, I'll be happy to include that as well.

MR. KAGEN: I would ask for an institution somewhere in the Chicago-Milwaukee metropolitan area.

THE COURT: All right. I believe the closest facility, Ms. Morgan, is at Pekin, Illinois, is that correct?

MS. MORGAN: That's correct, your Honor.

THE COURT: All right. I'll include that as the court's recommendation, again recognizing, of course, that the Bureau of Prisons is not always able to accommodate the court's recommendation either because of prison classification requirements in terms of security risks or this issue of drug treatment. It may be more available at another facility instead of Pekin, but we'll include that as the court's recommendation.

Are there any other matters that we need address in this case, Mr. Kagen?

MR. KAGEN: Finally, Judge, she would ask that the [31] clerk enter a notice of appeal. She is indigent. I don't know who would be appointed.

THE COURT: You have not been relieved and if you choose not to represent Ms. Buford on appeal, that is a matter that you must address with the Court of Appeals. The Court of Appeals has, in essence, precluded us at the district court level granting counsel leave to withdraw until they've had a chance to address whatever concerns you or your client may have first with regard to the matter of an appeal generally. And so while the clerk of the court certainly is free to, at your request, prepare and file a notice of appeal on her behalf, you should

understand that you have not been relieved as her counsel. That is a matter that you will have to address with the Seventh Circuit Court of Appeals at the appropriate time.

Mr. Robles and Mr. Larsen, do you have any other matters?

MR. ROBLES: No, your Honor.

THE COURT: All right. Court stands in recess.

(Proceedings concluded at 9:30 a.m.)

[32] CERTIFICATE

I, Diane Meredith, Official Court Reporter, United States District Court, Eastern District of Wisconsin, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 23rd day of April, 1999.

s/
Diane Meredith, RPR-CM
Oficial Court Reporter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

PAULA LOUISE BUFORD
a/k/a "Paula L. Bufford"

JUDGMENT IN A CRIMINAL CASE
Case Number: 98-CR-210-001

Robert A. Kagen
Defendant's Attorney

David Robles
Special Assistant United States Attorney

(Filed Apr. 2, 1999)

THE DEFENDANT:

pleaded guilty to Count One of the Indictment.

Title & Section	Nature of Offense	Date Concluded	Counts(s)
18 U.S.C. § 2113(a) & (d)	Armed Bank Robbery	3/18/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date Sentence Imposed:
April 2, 1999

Defendant's Soc. Sec. No.: 336-48-7337
Defendant's Date of Birth: 8/10/55
Defendant's USM No.: 05422-089
Defendant's Legal Address:
9510 West Fond du Lac Avenue
Apartment 22
Milwaukee, WI 53225

Date Sentence Imposed:
April 2, 1999

/s/ J.P. Stadtmueller
J.P. Stadtmueller
Chief Judge

April 2, 1999
Date Judgment Signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred eighty-eight (188) months as to Count One of the indictment.

The defendant is remanded to the custody of the United States Marshal.

The court makes the following recommendation to the Bureau of Prisons:

(1) that the defendant be evaluated for her participation in a drug treatment and counseling program; and

(2) that the defendant be incarcerated at FCI – Pekin, IL.

RETURN

I have executed this judgment as follows:

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of five (5) years as to Count One of the indictment.

The defendant shall not commit another federal, state, or local crime and shall comply with the following special conditions:

1. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm as defined in 18 U.S.C. § 921 or any other dangerous weapon.

3. Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the defendant shall not illegally possess any controlled substance. Such possession will result in revocation of the supervised release term and

the defendant will be obligated to serve a further term in prison.

4. The defendant shall participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as directed by her supervising probation officer, until such time as the defendant is released from such program. The defendant is to refrain from the use of all alcoholic beverages throughout the period of her supervised release term.

5. After release from imprisonment, the defendant is to reside for the first 90 days in a community correctional center upon the first available vacancy. The defendant is to obey the rules of that facility.

6. The defendant shall participate in a mental health treatment program and shall take any and all prescribed medications as directed by the treatment provider and participate in any psychological/psychiatric evaluation and counseling as may be directed by her supervising probation officer.

7. The defendant shall pay any balance of the restitution at a rate of no less than $50.00 per month.

8. The defendant is to provided access to all of the financial information required by her supervising probation officer.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set

forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or his or her supervising probation officer.

2. The defendant shall report to his or her supervising probation officer and shall submit a truthful and complete written report within the first five days of each month.

3. The defendant shall answer truthfully all inquiries by his or her supervising probation officer and follow the instructions of his or her supervising probation officer.

4. The defendant shall support his or her dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by his or her supervising probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify his or her supervising probation officer ten days prior to any change in residence or employment.

7. The defendant shall refrain from excessive use of alcohol.

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by his or her supervising probation officer.

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of his or her supervising probation officer.

11. The defendant shall notify his or her supervising probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by his or her supervising probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit his or her supervising probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5 Part B.

	Assessment	Fine	Restitution
Totals:	$100.00	$0	$2,615.00

FINE

Based on the defendant's limited finances the court determines that the defendant does not have the financial ability to pay a fine, costs of incarceration, costs of community confinement or supervision and therefore waives the fine, costs of incarceration, costs of community confinement and cost of supervision in this case.

A waiver of the cost of community confinement does not preclude the Bureau of Prisons from imposing a subsistence fee of up to 25 percent of gross income, based on ability to pay, for any portion of the sentence spent in a community correctional facility.

RESTITUTION

The defendant shall pay restitution to the following payee in the amount listed below. The court waives interest on the restitution.

Name of Payee	**Total Amount of Loss	Restitution Ordered
State Financial Bank ATTN: Ron Knaus Assistant Vice President 2650 North Downer Avenue Milwaukee, WI 53211	$2,615.00	$2,615.00
Totals:	$2,615.00	$2,615.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution. Special instructions regarding the payment of criminal monetary penalties:

The $100.00 special assessment is due and payable immediately to the Clerk of Court's office, Room 362, U.S. Courthouse.

The court considers the defendant's participation in the Federal Bureau of Prisons Inmate Financial Responsibility Program a necessary part of the repayment of the court-imposed financial obligations. Payments are to apply first to the special assessment and then to the restitution until paid in full.

During any period of supervised release, the defendant shall pay any balance of the restitution at a rate of no less than $50.00 per month.

** Findings for the total amount of losses are required under Title 18 of the United States Code, Chapters 109A, 110, 110A and 113A.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All Criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, his or her supervising probation officer, or the United States Attorney.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application contained in the 1/27/99 presentence report as updated and modified by the 2/23/99 and 3/26/99 addenda to that report. Furthermore, the court determines that the Milwaukee county Court did not consolidate the defendant's cases (numbers F-920368 and F-920369) for purposes of the 5/21/92 sentencing and that therefore they constitute two separate offenses.

Guideline Range Determined by the Court:

Total Offense Level: 31

Criminal History Category: VI

Imprisonment Range: 188 to 235 months

Supervised Release Range: 3 to 5 years

Fine Range: $15,000.00 to $150,000.00 (with costs of imprisonment/supervision)

Fine waived because of inability to pay.

Restitution: $2,615.00

$100.00 special assessment

This sentence is within the guidelines range, that range exceeds 24 months, and the sentence is imposed for the following reason:

(1) because of the seriousness and risk of harm of the defendant's offense in combination with her prodigious criminal history.

In the
United States Court of Appeals
for the Seventh Circuit

No. 99-1834

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAULA L. BUFORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 98-CR-210 – **J.P. Stadtmueller**, *Chief Judge.*

ARGUED NOVEMBER 17, 1999 –
DECIDED JANUARY 12, 2000

Before ESCHBACH, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Following her plea of guilty to armed bank robbery, see 18 U.S.C. § 2113(a) and (d), Paula Buford was sentenced to 188 months' imprisonment. The judge calculated an offense level of 31 (including all adjustments) after finding that she is a career offender. This led to a sentencing range of 188 to 235 months' imprisonment. If she is not a career offender, then her sentencing range is only 84 to 105 months.

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. Buford was 42 when she robbed the bank; armed bank robbery is a "crime of violence", see U.S.S.G. § 4B1.2(a)(1), even though the object Buford described as a bomb would not have exploded; and she has more than 22 prior convictions. Details of many convictions are missing from the record, because state courts have destroyed relevant documents (most of the crimes are more than a decade old) and Buford has not turned over information in her own possession. But the district judge counted five more-recent convictions that meet the standard of § 4B1.1. In 1992 Buford was convicted in a Wisconsin court of four armed robberies and possessing cocaine with intent to deliver it.

Five exceeds two, but this does not end the discussion, because a definitional provision in § 4B1.2(c)(2) says that, when counting convictions for purposes of the career offender provision, the judge must determine that "at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c)." Turning back to § 4A1.2(a)(2) we find: "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c)." So when are cases "related"? Application Note 3 to § 4A1.2 offers this advice:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

Buford's four armed robberies and one drug offense did not occur on the same occasion. See *United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (en banc) (defining "occasion" for purposes of 18 U.S.C. § 924(e)(1), the Armed Career Criminal statute). Nor were they part of a common scheme or plan. The district court sensibly rejected Buford's argument that all crimes designed to raise revenue are related by that objective, which would treat a one-woman crime wave as having but a single countable offense and thus negate the principal function of the career offender guideline. Buford therefore relies on (C), asserting that the cases were consolidated for sentencing. As is frequently true, the details are messy and defy easy characterization – and the Sentencing Commission has not offered guidance on intermediate situations.

Buford was arrested in Milwaukee on January 23, 1992, after robbing a gas station at gunpoint. A search of her residence turned up a pistol, the loot, and 73 grams of cocaine. Buford confessed to three additional armed robberies of gas stations during 1990 and 1991. On January 27, 1992, state prosecutors filed two criminal complaints against Buford. The first charged her with committing five armed robberies. The second charged the drug

offense and was assigned to a branch of the circuit court designated to handle drug prosecutions. Wis. Stat. § 753.061(2). The cases were handled by different prosecutors and assigned to different judges. Buford pleaded guilty to four of the robberies and to the drug charge in separate hearings before the different judges. Sentencing in both prosecutions occurred on May 21, 1992, before the judge who had been assigned to the drug case. The record does not include an order of consolidation, though it does contain a letter from Buford's lawyer consenting to the procedure. The judge then imposed three sentences: 6 years for the drug offense; 12 years for two of the robberies; and 15 years for the other two robberies. These sentences ran concurrently. Two judgments (one for the robbery counts and one for the drug count) were entered. Wisconsin did not follow a truth-in-sentencing approach back in 1992; the 15-year sentence was "withheld" (a form of probation), and the 12-year term of imprisonment ended in less than 6 years, allowing Buford to rob a bank in 1998. Her federal 188-month sentence, which amounts to 15 years and 8 months, will keep her in prison for much longer than her state "15-year" sentence. (Wisconsin adopted a true-sentence approach effective January 1, 2000, too late for Buford.)

Everyone agrees that the four armed robberies were consolidated with each other for trial and sentencing and thus count as but a single crime of violence for purposes of § 4B1.1. Buford contends that the imposition of sentence by a single judge on a single occasion was a consolidation of the drug offense with the armed robberies for sentencing, within the meaning of Application Note 3.

The federal prosecutor replies that there was no *consolidation*: there is no order of consolidation, and separate judgments were entered following the sentencing. We have held that joint sentencing for administrative convenience is not "consolidation for sentencing" under Application Note 3. *United States v. Bomski*, 125 F.3d 1115, 1119 (7th Cir. 1997); *United States v. Stalbaum*, 63 F.3d 537, 539 (7th Cir. 1995); *United States v. Russell*, 2 F.3d 200, 204 (7th Cir. 1993). But we have also held that a formal order of consolidation is unnecessary, and that cases may be deemed functionally consolidated when they are factually or logically related, and sentencing was joint. *United States v. Joseph*, 50 F.3d 401 (7th Cir. 1995). Here a single sentencing hearing, informed by a single presentence report, ended in concurrent sentences. Buford contends that her crimes were related through her addiction and would have been charged in a single indictment or information but for Wisconsin's decision to require drug prosecutions to be handled separately. This is not so clear; Wisconsin follows the approach of Fed. R. Crim. P. 8(a), see Wis. Stat. § 971.12(1), and it might be hard to characterize the robberies and drug offense as "of the same or similar character or . . . based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Anyway, the separate drug court cuts both ways: the crimes *might* have been consolidated but for their assignment to separate branches, but the separation shows that Wisconsin does not want such prosecutions consolidated – and Application Note 3 defers to the state's practice on consolidation rather than creating an

independent federal rule. (Wisconsin's provision for separation is not airtight; the branches designated under § 753.061(2) are to handle drug cases "primarily" but not exclusively, which is why a single judge was able to sentence Buford for both the robberies and the drug offense. But the statute assuredly disfavors consolidation.)

Because elements of Buford's situation support either characterization, the standard of appellate review may be dispositive. If review is deferential, then affirmance follows straightaway, for the district court's conclusion that Buford's state cases were not functionally consolidated for sentencing cannot be called clearly erroneous. But if our role is to make a *de novo* decision, then this appeal could come out either way. What, then, is the right appellate posture? Until recently the court has treated this as an unresolved question. See *United States v. Carroll*, 110 F.3d 457, 460 (7th Cir. 1997); *United States v. Woods*, 976 F.2d 1096, 1099 (7th Cir. 1992); *United States v. Connor*, 950 F.2d 1267, 1270 (7th Cir. 1991); *Joseph*, 50 F.3d at 404; *Russell*, 2 F.3d at 204. Within the last few months two panels have taken a firm stance – but unfortunately the panels do not agree with each other, and the more recent panel did not acknowledge the prior, contrary decision. Compare *United States v. Joy*, 192 F.3d 761, 770 (7th Cir. 1999) (relatedness is a factual issue reviewed only for clear error), with *United States v. Jackson*, 189 F.3d 655, 658 (7th Cir. 1999) (all questions about application of the career offender guideline are reviewed *de novo*). Neither *Joy* nor *Jackson* gives a reason for its conclusion or evinces awareness that the issue had been reserved by earlier panels. Divergence within the circuit mirrors a conflict

among the circuits. Six review "relatedness" issues deferentially, while three engage in *de novo* decisionmaking. See *United States v. Correa*, 114 F.3d 314, 317 (1st Cir. 1997) (*de novo*); *United States v. Mapp*, 170 F.3d 328, 338 (2d Cir. 1999) (deferential); *United States v. Huggins*, 191 F.3d 532, 539 (4th Cir. 1999) (deferential); *United States v. Huskey*, 137 F.3d 283, 285 (5th Cir. 1998) (de novo); *United States v. Irons*, 1999 U.S. App. LEXIS 26887 at *9-10 196 F.3d 634, 638 (6th Cir. 1999) (deferential); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998) (deferential); *United States v. Allen*, 153 F.3d 1037, 1045 (9th Cir. 1998) (*de novo*); *United States v. Wiseman*, 172 F.3d 1196, 1219 (10th Cir. 1999) (deferential); *United States v. Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995) (deferential). By revisiting the subject, we can create at least intra-circuit harmony.

"Relatedness" and "consolidation" are not pure questions of law. No legal rule specifies what it means for cases to be "consolidated for sentencing." If in *Joseph* we had adopted the view that "consolidation" is a matter of form – cases are consolidated if there is an order of consolidation, otherwise not – then it would make sense to engage in *de novo* consideration. A record either contains an order of consolidation or it doesn't, which dictates a legal outcome – though if the existence of the order were debatable, the district judge's resolution of that wholly factual issue would be reviewed deferentially. But once *Joseph* adopted a functional approach to consolidation, it became impossible to say that one characterization rather than another is mandatory. We have instead a classic mixed issue, where the court must apply legal norms to classify the facts. And disputes about the proper characterization of events, when legal norms guide rather

than determine the answer, are principally committed to district courts, with deferential appellate review. Thus even though a finding of racial discrimination requires the application of law to facts, the existence of discrimination is itself a "fact" and review is for clear error only. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Whether an employee is a "seaman" under a multi-factor balancing approach likewise is a question of fact, with deferential appellate review. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Even the question whether a complaint is "frivolous" for purposes of Fed. R. Civ. P. 11 – a subject that requires no fact-finding by the district court – is reviewed deferentially. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990).

Cooter & Gell holds that when the legal inquiry resists statement as a rule of general applicability, and when the application of that rule is a case-specific determination, courts of appeals should treat the district judges' conclusions deferentially. Our own cases likewise emphasize that matters of characterization and application, which lack general significance to other litigants, are best resolved by the district court, with a light appellate touch. See, e.g., *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (en banc); *Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583 (7th Cir. 1998); *Mucha v. King*, 792 F.2d 602, 604-06 (7th Cir. 1986); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1428-29 (7th Cir. 1985). As the second circuit put the point in *Mapp*, 170 F.3d at 338 n.15, deferential review is appropriate "[b]ecause of the (obviously) fact-intensive nature of the inquiry and because a sentencing court's findings regarding factual relatedness in any given case are

unlikely to establish widely-applicable principles of law". (None of the three circuits that has gone the other way has offered a reasoned explanation for the choice, and the fifth circuit in *United States v. Garcia*, 962 F.2d 479, 481 (5th Cir. 1992), explained that although the argument for deferential review is "compelling," the circuit would continue to use *de novo* review because of unexplained prior decisions.)

How best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties. Someone has to select a characterization of complex facts, and the best candidate for that role is the district judge. Questions concerning application of the Guidelines generally are reviewed deferentially, see *Koon v. United States*, 518 U.S. 81, 96-100 (1996), unless the district court makes an identifiable legal mistake; that principle is as applicable to "relatedness" as it was to the questions under review in *Koon*. We hold accordingly that whether cases have been "consolidated" for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals. Other issues in the application of the career-criminal guideline may be strictly matters of law with general application, and for those issues review would be plenary. Because this conclusion resolves a conflict among panels of this court, it was circulated to all active judges under Circuit Rule 40(e). None of the judges favored a hearing en banc.

The district judge did not commit a clear error in finding that the joint sentencing was a matter of administrative convenience rather than a "consolidation for sentencing." Separate sentences were imposed and separate judgments entered. Treating Buford as a career offender

makes a good deal of sense; her lengthy record demonstrates that she is an incorrigible criminal who regularly uses weapons (or, in her latest robbery, the threat of a bomb). With a record of convictions past two dozen, she is a "career" offender.

AFFIRMED

A true Copy:

Teste:

/s/ [Illegible]
Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 12, 2000

BEFORE:

Honorable JESSE E. ESCHBACH, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 99-1834

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

PAULA L. BUFORD,

Defendant – Appellant

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 98 CR 210, J. P. Stadtmueller, Chief Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

September 26, 2000

WILLIAM K. SUTER
CLERK OF THE COURT

Mr. Robert A. Kagen
Goldstein & Kagen
740 N. Plankinton Ave., #334
Milwaukee, WI 53203

Re: Paula K. Buford
v. United States
No. 99-9073

Dear Mr. Kagen:

The Court today entered the following order in the above entitled case:

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk